IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID LANE JOHNSON,	)	
	)	
Plaintiff/Movant,	)	
	)	Case No. 5:17-cv-00047
vs.	)	Judge Sara Lioi
	)	
NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, ET AL.,	)	
	)	
Defendants/Respondents.	)	

DEFENDANT NFLPA'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD

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STATEMENT OF THE ISSUES TO BE DECIDED

Whether Plaintiff's Refiled Motion to Vacate the Award should be denied because his allegations of evident partiality and objections to the arbitrator selection process have no merit and have been waived, and because his accusations of "corruption" and "fraud" are similarly meritless and unsupported by any record evidence.

SUMMARY OF THE ARGUMENT

The National Football League Players Association ("NFLPA" or "Union") hereby opposes Plaintiff David Lane Johnson's ("Plaintiff" or "Johnson") Refiled Motion to Vacate Arbitration Award under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, Doc. Nos. 52, 52-1 ("Motion").

Johnson's allegations of evident partiality and objections to the arbitrator selection process have no merit. Arbitrator James Carter is a properly selected neutral arbitrator with impeccable credentials and no evident partiality in this matter. Presumably, this is why Johnson did not object to Arbitrator Carter's serving, despite knowing of his affiliation with WilmerHale before the arbitration. Johnson's meritless objections have therefore also been waived. A party may not decline to object to an arbitrator during the arbitration and then do so only after the arbitrator issues an adverse award.

As for Johnson's accusations of "corruption" and "fraud," he concedes his burden is to come forward with "clear and convincing evidence." Mot., Doc. No. 52-1 at 2278. Indeed, this is not a Rule 12(b)(6) motion where a plaintiff may fall back upon well-pled *allegations*—Johnson must present *proof*. But Johnson's Motion rests on fanciful conspiracy theories, not evidence.[1] The Motion also rests on Johnson's miscasting all of Arbitrator Carter's adverse findings as "corruption" and "fraud" in an effort to conduct a legally improper back-door, *de novo* re-litigation of the merits of his arbitration. As Johnson concedes, "in actions to vacate arbitration awards, courts may not evaluate the merits of the underlying grievance/arbitration." Opp'n to Mot. to Dismiss, Doc. No. 54 at 2919 n.20. The arbitral record shows that Arbitrator Carter

[1] Johnson states that he "file[d] this Motion before any opportunity to conduct discovery" and "[t]hat discovery will provide additional details." Mot., Doc. No. 52-1 at 2274 n.3. But Johnson must justify his Motion on the facts before him.

thoroughly considered and rejected every argument that Johnson now recycles in his Motion as a ground for vacatur and there is no legal basis for this Court to second guess any of Arbitrator Carter's rulings or his affirmance of Johnson's discipline. This is particularly true because it is undisputed that, during the arbitration, Johnson admitted to violating the PES Policy.

Johnson's Motion should be denied in its entirety. Once again, however, the NFLPA will not address Johnson's arguments about the substance or process of the arbitration itself. This Opposition instead responds to Johnson's baseless claims about arbitrator bias and the arbitrator selection process, and about the NFLPA's purported corruption and fraud—neither of which is supported by any record evidence.

BACKGROUND

A. The Parties and the PES Policy

The NFLPA is the Union for all professional football players in the National Football League ("NFL"). The NFLPA represents players, including Johnson, in collective bargaining with the NFL Management Council ("NFLMC").

The NFLPA and NFLMC collectively bargained the 2015 National Football League Policy on Performance-Enhancing Substances ("PES Policy"). *See* Am. Compl. and Pet. to Vacate Arb. Award ("FAC"), Ex. A., 2015 PES Policy, Doc. No. 39-1. "The Policy is conducted under the auspices of the NFL Management Council." *Id.* at 1785. The PES Policy states that "[t]he Parties are concerned with the use of [PESs] based on three primary factors," they: (1) "threaten the fairness and integrity of the athletic competition on the playing field"; (2) have "adverse health effects" on players; and (3) "send[] the wrong message to young people." *Id.* at 1784-85.

B. The NFLPA Collectively Bargains for Neutral Arbitration Under the Policy

Historically, player appeals under the PES Policy were heard by the NFL Commissioner

or his designee, usually someone affiliated with (*e.g.*, employed by) the NFL, such as the NFL's General Counsel. *See, e.g., Williams v. NFL*, 582 F.3d 863 (8th Cir. 2009). The NFLPA had no input or approval rights over the arbitrators for PES Policy appeals.

In 2014, however, the NFLPA succeeded in its efforts to collectively bargain for neutral arbitration for player appeals under the PES Policy as well as under the Policy and Program on Substances of Abuse ("SOA Policy," and together with the PES Policy, the "Drug Policies"). Although they address different categories of banned substances, the Drug Policies overlap in many respects. *See* 2015 SOA Policy, attached hereto as Exhibit A.

The bargained-for change from NFL-affiliated arbitrators to "third-party arbitrators not affiliated with the NFL, NFLPA or Clubs" (PES Policy, Doc. No. 39-1 at 1796)—*i.e.*, neutrals—was heralded as a significant achievement for the players and their Union.[2]

C. The NFL and NFLPA Jointly Select Glenn Wong and James Carter to Serve as Arbitrators Under the Drug Policies

On March 19, 2015, the NFLPA and NFLMC jointly selected Glenn Wong to serve as Notice Arbitrator for appeals under the Drug Policies. *See* Letter from A. Birch and T. DePaso to G. Wong (Mar. 19, 2015), attached hereto as Exhibit B.

It took the NFLMC and NFLPA a few more months to agree on a second arbitrator. On June 10, 2015, they jointly retained James Carter to serve as the second neutral arbitrator under the Drug Policies. *See* Letter from A. Birch and T. DePaso to J. Carter (June 10, 2015), attached hereto as Exhibit C ("June 10 Letter"). Carter's qualifications are beyond reproach:

> Mr. Carter is chair of the Board of Directors of the New York International Arbitration Center. He is a former chairman of the Board of Directors of the

[2] *See, e.g.*, USA Today, "NFL lifts suspensions of Wes Welker, two others with revised PED policy," *available at*: https://www.usatoday.com/story/sports/nfl/2014/09/17/nfl-lifts-suspensions-of-wes-welker-two-others-with-revised-ped-policy/15723307/ (Sept. 17, 2014) (noting that "the league and union finalized the new performance-enhancing drug policy, which now includes . . . neutral arbitration"); LA Times, "NFL, players association reach agreement on testing players for HGH," *available at*: http://www.latimes.com/sports/sportsnow/la-sp-sn-nfl-drug-policy-20140917-story.html (Sept. 17, 2014).

> American Arbitration Association, a member of the Court of Arbitration for Sport in Lausanne, Switzerland and a former member of the London Court of International Arbitration, for which he also served as vice president of its North American Council. He is an advisor to the American Law Institute's reporters drafting the Restatement of the US Law of International Commercial Arbitration and is a former president of the American Society of International Law.
>
> In addition, Mr. Carter has chaired the American Bar Association's Section of International Law, as well as its Committee on International Commercial Arbitration, and served as the ABA's representative to the United Nations. He is a former chairman of the New York State Bar Association Committee on International Dispute Resolution and the International Affairs Council of the Association of the Bar of the City of New York. Mr. Carter also chaired the International Law Committee of the New York State Bar Association.[3]

Arbitrator Carter is affiliated with the WilmerHale law firm (he is presently listed on their website as Senior Counsel). Johnson does not allege—let alone "establish specific facts" (Mot., Doc. No. 52-1 at 2284)—that Carter has done work at WilmerHale for the NFL, the NFLMC, any NFL team, or the NFLPA. Moreover, everything Johnson complains about—*i.e.*, Carter's association with WilmerHale and his appointment as arbitrator—was known or easily knowable to Johnson prior to the arbitration.

For example, in pre-hearing scheduling communications with Johnson's counsel, Carter sent emails from his "james.carter@wilmerhale.com" email address. *See, e.g.*, Email Exchange between J. Carter and P. Hoban, *et al.* (Sept. 20, 2016), attached hereto as Exhibit D, at 1-2. Before that, and more fundamentally, the NFLPA expressly told Johnson's counsel (twice) about Carter's affiliation with WilmerHale prior to his designation as arbitrator: "Also, as mentioned on our call, there are two arbitrators, Professor Wong and James Carter, who is Of Counsel at Wilmer Hale. Mr. Carter is based in NYC, so should be convenient for in-person." Email from H. McPhee to D. Vance, *et al.* (Sept. 20, 2016), attached hereto as Exhibit E, at 1.[4] Thus, the

[3] James H. Carter's "Professional Activities," *available at*: https://www.wilmerhale.com/james_carter/#!4.

[4] A Google search for "James Carter arbitrator" yields Carter's WilmerHale web page as the first search return: https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=james+carter+arbitrator.

NFLPA also told Johnson there were two—not three—PES Policy arbitrators prior to his arbitration and that one of them, Arbitrator Carter, was counsel at WilmerHale.

With respect to WilmerHale, Johnson complains that "WilmerHale was representing the [NFL], while Johnson's appeal was pending before Carter," but only specifies WilmerHale's "handling of the Ray Rice domestic violence situation on September 10, 2014." FAC ¶¶ 180, 182, Doc. No. 39 at 1758. This is a reference to former FBI Director and current WilmerHale partner Robert S. Mueller's investigation of the NFL and ensuing public report which *criticized* the NFL's handling of the Rice matter. *See* Wall Street Journal, "Mueller: NFL Fell Short in Rice Case," *available at*: https://www.wsj.com/articles/investigator-nfl-should-have-sought-more-information-in-ray-rice-case-1420748155 (Jan. 8, 2015).[5] Johnson previously described Mueller's work as "high-profile" (Original Motion, Doc. No. 3-1 at 133) and, indeed, a former FBI Director's investigation of the NFL in a matter receiving intense public scrutiny was widely known.[6] In any event, Johnson does not contend that Arbitrator Carter had anything to do with the Rice investigation (and in fact Carter did not).

The NFLMC and NFLPA did not reach an agreement on a third neutral arbitrator for the Drug Policies until recently. *See* Letter from A. Birch and T. DePaso to S. Das (Dec. 1, 2016), attached hereto as Exhibit F. However, as described below, Johnson does not allege that there was no arbitrator selected by the parties available to timely hear his appeal (in fact, both Arbitrators Wong and Carter made themselves available).

D. Johnson Elects to Have Arbitrator Carter Preside Over His Appeal

On September 6, 2016, the NFL notified Johnson that he would be suspended for violating the PES Policy. FAC ¶ 56, Doc. No. 39 at 1740. Johnson appealed (*id.* ¶ 57), and his

[5] *See also* NBC News, "NFL Fumbled Ray Rice Case: Investigator," *available at*: http://www.nbcnews.com/storyline/nfl-controversy/nfl-fumbled-ray-rice-case-investigator-n282446 (Jan. 8, 2015).
[6] Johnson has deleted that admission from the latest iteration of his Motion, Doc. No. 52-1.

hearing was automatically scheduled pursuant to the terms of the PES Policy:

> Any player who is notified by the [NFLMC] that he is subject to a fine or suspension for violation of the terms of this Policy may appeal such discipline in writing within five (5) business days of receiving notice from the NFL that he is subject to discipline. Appeal hearings will be scheduled to take place on the fourth Tuesday following issuance of the notice of discipline.

PES Policy, Doc. No. 39-1 at 1798.

Arbitrator assignments are automatic too: "Appeals will automatically be assigned to the arbitrator assigned to cover the fourth Tuesday following the date on which the Player is notified of discipline." *Id.* at 1796. Players thus have no right under the PES Policy to choose their specific arbitrator from among those jointly selected by the NFLPA and NFLMC. Johnson's appeal hearing was scheduled for October 4, 2016 and assigned to Arbitrator Wong, who had previously been scheduled to cover that date. *E.g.*, FAC ¶ 60, Doc. No. 39 at 1740. On September 20, the NFLMC informed Johnson's personal attorneys that Arbitrator Wong had advised the NFLMC and NFLPA that he was available for a telephonic hearing on October 4 but could not conduct the hearing in-person. *See* Ex. D at 4; Ex. E at 2; PES Policy, Doc. No. 39-1 at 1799 ("The hearing may be conducted by conference call upon agreement of the Parties."). The NFLMC further informed Johnson that Arbitrator Carter, however, could be available in person on October 4 and left it to Johnson to choose "how [he] prefer[red] to proceed":

> Arbitrator Wong has advised the parties that he cannot be available in person for Mr. Johnson's appeal hearing. The Management Council is prepared to conduct the hearing by phone before Arbitrator Wong. Alternatively, if you want to be heard in person, the parties have agreed that it would be appropriate for Arbitrator James Carter to hear Mr. Johnson's appeal.
>
> Please let us know how you prefer to proceed. We [the NFL] will respond to your other correspondence as appropriate.

Ex. D at 4; Ex. E at 2.

Johnson's counsel responded that "Mr. Johnson still wishes to have his appeal heard in

person" and therefore "he is amenable to changing the arbitrator," *i.e.*, changing from Wong to Carter. Ex. D at 3; Ex. E at 1. Johnson's counsel also raised questions about the arbitrator selection process, to which the NFLPA responded by reiterating: "as mentioned on our call, there are two arbitrators, Professor Wong and James Carter, who is Of Counsel at Wilmer Hale." Ex. E at 1.

Thereafter, the NFL wrote to both Arbitrators Carter and Wong—copying Johnson's counsel—to indicate that Carter, not Wong, would proceed:

> Arbitrators Wong and Carter,
>
> Please see the below email exchange between the Management Council and Lane Johnson's private attorneys related to his appeal hearing under the Policy on Performance-Enhancing Substances, scheduled for October 4, 2016. As you can see, Mr. Johnson would like to have his appeal heard in person at the NFL's New York office on October 4. As Arbitrator Wong has advised he is not available in person on that date, Mr. Johnson has elected to proceed before Arbitrator Carter. Thank you both for your flexibility.
>
> Arbitrator Carter, the Management Council will promptly send you a copy of the Hearing Binder, which was provided to Mr. Johnson's counsel on September 13, 2016. You will also note a reference in Mr. Vance's email below to a dispute that has arisen between the Management Council and Mr. Johnson's counsel. We will forward you momentarily the email exchange on that topic, and as well as the Management Council's response to Mr. Hoban's most recent email. The Management Council is available for a conference call on this issue, as well as other discovery issues, on Thursday or Friday of this week.
>
> Respectfully submitted,
> Meghan Carroll

Ex. D at 2.

In response, Arbitrator Carter wrote (from his @wilmerhale.com email address) to Johnson's counsel and the NFLMC about scheduling a conference call concerning the appeal. *Id.* Shortly thereafter, Johnson's counsel wrote back to Arbitrator Carter "[t]o clarify" that Johnson had not selected a particular arbitrator but was instead selecting an in-person hearing. *Id.* at 1.

Johnson's counsel also wrote—without objection—that they were available for the proposed scheduling call and looked forward to speaking with Arbitrator Carter. *Id.*

Although Johnson portrays his role in the change from Arbitrator Wong to Carter as insisting on an in-person hearing rather than selecting Arbitrator Carter, the point is that the evidence establishes the falsity of Johnson's contention that Defendants "improperly 'cherry picked' the arbitrator to hear Johnson's appeal." Mot., Doc. No. 52-1 at 2280. In reality, Johnson was given the choice to decide "how [he] prefer[red] to proceed"—and he chose to appear in person before Arbitrator Carter.

E. Johnson Has "No Objection to [Arbitrator Carter's] Qualifications"

A few days later, Johnson's attorneys participated in a telephonic pre-hearing discovery conference with Arbitrator Carter, the NFLMC, and the NFLPA. Johnson's counsel stated:

> There are already examples of the NFL's deviation from that policy, ***and while we have no objection to your qualifications***, the citizen [*sic*] arbitrator in this matter, it is also clear that the letter of the policy with regard to arbitrator assignment has been deviated from, and there's no indication as to why or where that came from.

Refiled Mot. to Vacate Arb. Award, Ex. 5, Disc. Hr'g Tr. ("Disc. Hr'g Tr.") 6:2-10, Doc. No. 52-6 at 2605 (emphasis added). At this point, Johnson was fully aware of Arbitrator Carter's affiliation with WilmerHale yet had "no objection to [Arbitrator Carter's] qualifications" to serve. Further, to the extent Johnson now purports to object to there being two not three arbitrators under the PES Policy at the time, or to the manner in which Carter had been appointed as arbitrator, Johnson was also fully cognizant of these issues and did not raise them at the arbitration

F. In Appealing His Discipline, Johnson Raises No Objection to Carter's Alleged Evident Partiality or the Manner in Which He Was Appointed

On September 28, Johnson submitted his Basis of Appeal which, per the PES Policy, must "set[] forth the specific grounds upon which the appeal is based." PES Policy, Doc. No. 39-

1 at 1801. Johnson did not raise anything related to evident partiality, arbitrator selection, or the number of available arbitrators as a ground for appeal. *See* Mot. to Dismiss, Ex. C, Basis of Appeal, Doc. No. 26-4. To the contrary, the Basis of Appeal repeatedly requests that "this Arbitrator"—*i.e.*, Carter—rule in Johnson's favor. *Id.* at 853, 856-858.

On October 4, 2016, Arbitrator Carter presided over Johnson's appeal hearing. He heard seven hours of sworn testimony and argument, and made myriad evidentiary rulings for and against Johnson and the NFL. *See* Refiled Mot. to Vacate Arb. Award, Ex. 3, Arb. Tr., Doc. No. 52-4. Not once during the appeal hearing did any one of Johnson's three lawyers state any objection to Arbitrator Carter's fitness to serve or evident partiality, nor to the arbitrator selection process.

On October 11, Arbitrator Carter issued his twelve-page Reasoned Decision and Award ("Award") denying Johnson's appeal. FAC, Ex. B, Award, Doc. No. 39-2. Arbitrator Carter made factual findings with respect to Johnson's unequivocal admission that he had used the banned substance at issue and addressed each of the arguments raised by Johnson in his Basis of Appeal. Arbitrator Carter did not have the opportunity to address any purported evident partiality, the manner of his appointment as Arbitrator, or the number of arbitrators because Johnson never asserted any such objections to Arbitrator Carter.

ARGUMENT[7]

I. Johnson Has Waived His Arguments About Arbitrator Carter's Alleged Evident Partiality and the Arbitrator Selection Process

Johnson's own authority recognizes that "as a general rule, a grievant must object to an arbitrator's partiality at the arbitration hearing before such an objection will be considered by the

[7] Johnson seeks to vacate what undeniably is a *labor* arbitration and, accordingly, "petition[ed] this Court, pursuant to Section 301 of the Labor Management Relations Act" ("LMRA"). FAC, Doc. No. 39 at 1725. Yet his Motion presents no argument under the LMRA's standards for vacatur.

federal courts." *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358–59 (6th Cir. 1989). Parties to arbitration cannot "seek victory before the tribunal and then, having lost, seek to overturn it for bias never before claimed" because courts "will not entertain a claim of personal bias where it could have been but was not raised at the hearing to which it applies." *Early v. E. Transfer*, 699 F.2d 552, 558 (1st Cir. 1983); *see also Detroit Newspaper Agency v. Newspaper Drivers & Handlers, Teamsters Local No. 372*, 45 F.3d 430, at *1 (6th Cir. Dec. 22, 1994) (holding that plaintiff "waived its right to argue that the arbitrator exceeded his authority" because "[o]ne who fails to object promptly to procedural errors made at an arbitration hearing waives the right to later assert those errors"); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 674 (5th Cir. 2002) ("It is well settled that a party may not sit idle through an arbitration procedure and then collaterally attack the procedure on grounds not raised before the arbitrators when the result turns out to be adverse.") (citation omitted). This black letter law is the beginning and end of Johnson's arguments about evident partiality and improper arbitrator selection.

Johnson has come forward with no ***evidence*** to support his arguments that he "discovered" "subsequent to the . . . Award" that "Carter was affiliated with Defendants." Mot., Doc. No. 52 at 2265. To the contrary, Johnson knew—indeed, the NFLPA and NFL told him—the identities of Arbitrators Wong and Carter, their status as the two (not three) arbitrators under the PES Policy, and Carter's affiliation with WilmerHale prior to the arbitration hearing. *Supra*, *e.g.*, Ex. D at 2 (Sept. 20, 2016 email from "James.Carter@wilmerhale.com" to Johnson's counsel); Ex. E at 1 (Sept. 20, 2016 email from H. McPhee to Johnson's counsel indicating that "there are two arbitrators, Professor Wong and James Carter, who is Of Counsel at Wilmer Hale"). Nor does Johnson substantiate that he did not know about WilmerHale's "high-profile" role in the Rice investigation. Carter's dual status as an arbitrator under the PES and SOA

Policies was also a publicly available fact about which Johnson should have been aware and neither Johnson nor his counsel offer any declaration or other evidence that they were not. *See, e.g.*, Curriculum Vitae of James H. Carter, *available at* http://www.tas-cas.org/uploads/tx_tascas/CV_Carter_Sep2016.pdf (listing his position as "Appeals Arbitrator for Policy and Program on Substance Abuse and Policy on Performance-Enhancing Substances, 2015-present").

Even if Johnson did not know some of these facts prior to the arbitration, he offers no evidence that he or his representatives exercised due diligence to investigate and could not discover the facts he argues now. Instead, Johnson argues he had no such obligation, but this is contrary to the law. *See Uhl v. Komatsu Forklift Co.*, 466 F. Supp. 2d 899, 907 (E.D. Mich. 2006), *aff'd*, 512 F.3d 294 (6th Cir. 2008) (cited by Johnson and holding that "[s]ince defense counsel knew about the event well before the arbitration hearing, the defendants have failed to demonstrate why defense counsel's exercise of due diligence prior to the arbitration would not have uncovered the relationship of which they now complain" and noting that raising such an objection only "after an unfavorable award had been announced" "suggest[s] that nothing about arbitrator Stein's behavior at the hearing caused the defendants to question his impartiality"); *Pontiac Trail Med. Clinic, P.C. v. PaineWebber, Inc.*, 1 F.3d 1241, at *4 (6th Cir. July 29, 1993) (plaintiff "has failed to show that it exercised due diligence" because he "has given no reason why it could not have reasonably obtained [information regarding the alleged fraud] prior to or during the arbitration hearing").

Johnson argues that it was Carter's obligation to affirmatively disclose his own financial relationships with the NFL. Mot., Doc. No. 52-1 at 2283 (citing *Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145 (1968)). This is wrong on several levels. *First*, as the

authorities cited above demonstrate, courts require parties seeking vacatur to demonstrate that they could not have learned about the alleged bias prior to or during the arbitration.[8] Here, there can be no dispute that Carter's affiliation with WilmerHale, WilmerHale's work for the NFL on the Rice matter, and Carter's then-status as one of only two arbitrators under the Drug Policies were known (or easily discoverable) by Johnson and his attorneys prior to the arbitration.

Second, Johnson's reliance on *Commonwealth Coatings* is misplaced;[9] whether Carter did or did not disclose his purported conflicts is not relevant, because Johnson was aware of Carter's affiliation with WilmerHale and knew (or could have easily discovered) WilmerHale's work on the Ray Rice investigation and Carter's service as an arbitrator under the SOA Policy prior to the arbitration. *See Commonwealth Coatings*, 393 U.S. at 150 ("arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial") (White, J., concurring); *Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) ("cases in which courts have faulted arbitrators for their failure to disclose potential sources of bias, *e.g.*, *Commonwealth Coatings* . . . are inapposite" where the potential sources of bias are "known to the parties prior to the hearing"). And as Carter's disclosure in a subsequent matter (*Pennel*, discussed below)

[8] *See also Apperson*, 879 F.2d at 1359 (rejecting evident partiality challenge where plaintiff failed to set forth "specific facts" showing that it did not learn about the alleged bias until after the hearing); *Uhl*, 466 F. Supp. 2d at 908 (rejecting evident partiality challenge even where arbitrator "failed to disclose required information" because "counsel for the defendants had actual knowledge of some of the" contacts giving rise to the alleged bias); *Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.)*, 579 F.2d 691, 702 (2d Cir. 1978) (arbitrator's failure to disclose is not relevant to evident partiality claim where the alleged bias "was no secret" and could have been discovered upon "an exhaustive review").

[9] Johnson mainly relies on Justice Black's plurality opinion which, according to Johnson's own case law, "must be read as dicta." *Morelite Const. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 82-83 (2nd Cir. 1984). Also according to Johnson's case law, Justice Black's "simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias"—to which Johnson refers (Mot., Doc. No. 52-1 at 2283, 2285)—is "imported" from the "rigorous standard . . . safeguarding the impartiality of Article III judges," which does not apply to arbitrators such as Carter. *Appl'd Indust'l Materials Corp v. Ovalar Makline Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 at 136-37 (2nd Cir. 2007).

confirmed, Carter had nothing to disclose because WilmerHale has no work related to NFL player issues and, in any event, Carter himself has had nothing to do with any NFL-related work at WilmerHale.

Finally, Johnson's assertion that Carter "failed to make any disclosure to Johnson" (Mot., Doc. No. 52-1 at 2285) is false—the main bias claim regarding Arbitrator Carter is his affiliation with WilmerHale and, as shown above, that *was* disclosed to Johnson.[10] Indeed, although Johnson's insistence that he "continuously" objected to Arbitrator Carter is inaccurate (*supra*), the argument rests on the premise that Johnson had sufficient information to raise an objection. *See, e.g.*, FAC ¶¶ 16(w), 325, Doc. No. 39 at 1731, 1775.[11]

The bottom line is that Johnson had it right when he told Arbitrator Carter that he had "no objection to [his] qualifications." Disc. Hr'g Tr. 6:2-10, Doc. No. 52-6 at 2605. Although Johnson tries to couch his statement as applying only to Arbitrator Carter's credentials, not his impartiality, the point is that Johnson's "no objection" statement is his *only* statement in the arbitral record about Arbitrator Carter's fitness to serve. Johnson's *post hoc* complaints of evident partiality, improper arbitrator selection, service under both Drug Policies, and the number of arbitrators have no merit, which presumably is why he did not timely raise them at the arbitration hearing. The claims have thus been waived.

II. Johnson Has Failed His Burden to Prove Arbitrator Carter's Evident Partiality

[10] Johnson tries to make much of the fact that Arbitrator Carter made a disclosure about the terms of his engagement with the NFL and the NFLPA in the *Pennel* arbitration (the substance of which we respond to below). Mot., Doc. No. 52-1 at 2285-86. But this just underscores the fact that, in *Pennel*, Johnson's counsel—who also represented Mr. Pennel—affirmatively raised the issue of evident partiality during the arbitration hearing. *See, e.g.*, Refiled Mot. to Vacate Arb. Award, Ex. 14 ("Ex. 14"), Doc. No. 52-15. Here, Johnson waived the issue, leaving Arbitrator Carter with no opportunity to consider or respond to these allegations.

[11] For example, at the discovery hearing, Johnson noted a concern about "arbitrator selection" but in his Basis of Appeal he raised no issues about the identity, selection or number of arbitrators, he never proceeded to file any recusal motion, and he otherwise made no request for relief (or argument) about such issues. *Cf. Brook*, 294 F.3d at 674 ("The failure to file a clear written objection to a defect in the selection process constitutes waiver" and holding that plaintiff's "failure to object at the hearing constitutes a waiver").

Johnson concedes that a party asserting evident partiality bears the burden of "'establish[ing] specific facts that indicate improper motives on the part of the arbitrator.' The standard requires more than an appearance of bias." Mot., Doc. No. 52-1 at 2284 (quoting *Uhl*, 512 F.3d at 306-07);[12] *see also* 9. U.S.C. § 10(a)(2). He argues that Arbitrator Carter was evidently partial because Carter (1) works at the WilmerHale law firm and (2) was retained to hear appeals under both Drug Policies. Mot., Doc. No. 52-1 at 2286. Even if Johnson had not waived his evident partiality objection, these arguments do not meet his burden.[13]

A. Carter's Work for WilmerHale Does Not Make Him Evidently Partial

After the NFLPA fought for years to achieve neutral arbitration for players in their PES (and SOA) Policy appeals, it is nonsensical that the NFLPA would thereafter agree to retain Carter if he were partial to the NFL. Such NFL-affiliation of the arbitrators is *exactly* what the NFLPA bargained to *eliminate* under the Drug Policies. *See supra*, Background § B.

James Carter is a world-renowned arbitrator with unquestionable credentials and had nothing to do with the Rice investigation in 2014 (years *before* the arbitration at issue), or any other work by WilmerHale for the NFL. The mere fact that Carter works for a 1,000-lawyer firm in which an ex-FBI Director conducted an independent investigation criticizing the NFL falls far short of "indicat[ing] improper motives on the part of the arbitrator." Mot., Doc. No. 52-1 at 2284 (quoting *Uhl*, 512 F.3d at 306-07).

By way of selective quotation, Johnson next argues that "WilmerHale represented clients

[12] Notably, the district court in *Uhl* held that defendants "waived . . . their claim of evident partiality" "because they waited until after the arbitration award was issued to raise [it]." 466 F. Supp. 2d at 908.

[13] Johnson also includes in his Motion several pages of argument that "Carter Demonstrated Bias Throughout the Proceedings" by virtue of various adverse decisions and findings. Mot., Doc. No. 52-1 at 2287-90. But this is just a request for the Court to conduct an improper *de novo* review of the merits of the Award in the guise of a "bias" argument. *See* Opp'n to Mot. to Dismiss, Doc. No. 54 at 2919 n. 20 ("in actions to vacate arbitration awards, courts may not evaluate the merits of the underlying grievance/arbitration"); *Grego v. Nexagen USA LLC*, No. 5:10cv2691, 2011 WL 2893068, at *3 (N.D. Ohio Jul. 15, 2011) (Lioi, J.) (cited by Johnson; stating that "the Court cannot review [evident partiality] claims" if party "challenge[s] the factual or legal determinations of the arbitrator").

engaged in 'transactions . . . with the NFL, the NFL Players Association, NFL teams or owners or NFL players or other personnel." *Id.* at 2286. Even if this were true,[14] this is not a statement about *representing* the NFL or the NFLPA—it is a statement about representing *other* clients who have "transactions, or encounter disputes, ***with***" the NFL or NFLPA. *See* Ex. 14, Doc. No. 52-15 at 2663 (emphasis added). Further, the terms of Carter's engagement permit WilmerHale (not *Carter*) to represent the NFL, a team, the NFLPA, or a player only if the matter "is not substantially related to [Carter's] work as an arbitrator in particular appeals." *See id.* And the *only* such matter "of which [Carter was] aware is advice by the [WilmerHale] Firm to the NFL with respect to a team ownership matter unrelated to any player issue. [Carter had] no involvement in or other knowledge of that matter and consider[ed himself] an independent and impartial arbitrator in this case." *Id.* Carter's firm's work on a "team ownership matter unrelated to any player issue" cannot carry Johnson's heavy burden to justify vacatur.[15] *See Molten Metal Equip. Innovations, Inc. v. Pyrotek Inc.*, No. 1:10CV388, 2010 WL 2639912, at *5 (N.D. Ohio June 29, 2010) (cited by Johnson; denying motion to vacate "even if the arbitrator stands to financially benefit if his law firm's client prevails in [a] litigation [where his firm was adverse to

[14] The statement—quoted by Johnson from Arbitrator's Carter engagement letter—actually says "[g]iven the breadth of the Firm's practice, *it is possible* that during the time I am acting as an arbitrator, some of WilmerHale's present or future clients will be engaged in transactions, *or encounter disputes*, with . . . ." Ex. 14, Doc. No. 52-15 at 2663 (emphasis added).

[15] Arbitrator Carter's book, on which Johnson appears to place a great deal of importance (Mot., Doc. No. 52-1 at 2285), expressly mentions that an arbitrator who is a member of a large law firm, such as WilmerHale, can "request an advance conflict waiver from the appointing party or parties" to avoid potential "conflicts issues." Refiled Mot. to Vacate Arb. Award, Ex. 13 ("Ex. 13"), Doc. No. 52-14 at 2661. This is exactly what Arbitrator Carter did here. *See* Ex. 14, Doc. No. 52-15 at 2663. As for the AAA/ABA Code of Ethics (Canon II) referenced in the Motion (Doc. No. 52-1 at 2285), it provides that an arbitrator "should" disclose certain interests or relationships; they are not "required" to do so. Ex. 13, Doc. No. 52-14 at 2661. In any event, even a theoretical violation of the Code of Ethics is not a proper basis to find evident partiality. *See Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 435 (11th Cir. 1995), *opinion modified and supplemented*, 85 F.3d 519 (11th Cir. 1996) (refusing to find arbitrator's undisclosed contacts sufficient to constitute evident partiality "although in violation of Canon II of the American Arbitration Association's Code of Ethics"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (although non-disclosure of past business relationship may have "violated current ethical norms for commercial arbitrators, [it] was at worst a technical violation that does not justify setting aside an award on the statutory ground of evident partiality or corruption"), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 529, 78 L.Ed.2d 711 (1983).

defendant's counsel]" because the issues in the litigation were unrelated to the issues arbitrated); *Uhl*, 512 F.3d at 307-08 (finding no evident partiality where arbitrator previously served as co-counsel with one of the parties' counsel and cautioning that "'[t]o disqualify any arbitrator who had professional dealings with one of the parties . . . would make it impossible, in some circumstances, to find a qualified arbitrator at all'") (citation omitted); *Apperson*, 879 F.2d at 1360 (6th Cir. 1989) (denying motion to vacate where arbitrator had formerly been a law partner with counsel to one of the parties).[16]

B. Carter's Work Under the SOA Policy Does Not Make Him Evidently Partial

The NFLPA's and NFL's simultaneous retention of Carter as an arbitrator under both the PES and SOA Policies does not render him "affiliated" with the NFL. *See* Ex. C (June 10 Letter). It is clear that the parties to the PES Policy—the NFLMC and the NFLPA—intended the reference to "third-party arbitrators not affiliated with the NFL, NFLPA, or Clubs" to mean *neutral* arbitrators in contrast with the prior Drug Policies' provision that the NFL Commissioner could unilaterally choose the arbitrators. *Supra.* Nothing prevents an arbitrator serving under the PES Policy from also serving as an arbitrator under the SOA Policy. In any event, an issue of CBA interpretation of the term "affiliation" would be for a CBA arbitrator, not this Court.

Moreover, the legal test for vacatur is not whether Arbitrator Carter's status as a SOA Policy arbitrator rendered him "affiliated" for purposes of the PES Policy. Rather, the legal test, as articulated by Johnson, is whether Arbitrator Carter's status as a SOA Policy arbitrator rendered him *evidently partial for purposes of the PES Policy*. There is no logical reason why a

[16] *See also Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (refusing to find evident partiality where arbitrator and lawyer who formerly represented one of the arbitrating parties currently worked in the same law firm and noting that finding otherwise "would disqualify most attorneys from large firms from acting as arbitrators"); *Own Capital, L.L.C. v. Johnny's Enterprises, Inc.*, No. 11-12772, 2011 WL 2560334, at *7 (E.D. Mich. June 28, 2011) (no evident partiality where plaintiff's counsel joined the arbitrator's firm after the arbitration); *Sanford Home for Adults v. Local 6, IFHP*, 665 F. Supp. 312, 320-22 (S.D.N.Y. 1987) (refusing to vacate award on grounds of evident partiality despite arbitrator's failure to disclose business ties with one party's law firm).

neutral arbitrator jointly selected by the parties to the CBA under one Drug Policy would inherently bear an appearance of bias for another Drug Policy when selected by the CBA parties to serve as a neutral arbitrator under that Policy as well.

III. Johnson Has Failed to Carry His Burden to Show that the Arbitrator Selection Process Was the Product of "Corruption, Fraud, or Undue Means"

Johnson admits that his burden is to "demonstrate (1) clear and convincing evidence of corruption, fraud, or undue means, (2) materially related to an issue involved in the arbitration, *and* (3) that due diligence would not have prompted its discovery during or prior to the arbitration." Mot., Doc. No. 52-1 at 2278 (citation omitted; emphasis added).

A. The "Two Arbitrator" Issue Is an Utter Red Herring

First, as shown above, Arbitrator Carter was not selected by NFL/NFLPA "cherry picking." Johnson himself "prefer[red] to proceed" with an in-person hearing before Arbitrator Carter, rather than a telephonic hearing before Arbitrator Wong. That is evidence of accommodation to Johnson's wishes, not "corruption." Nor has Johnson adduced any evidence that the availability of two instead of three arbitrators was the product of corruption. The PES Policy does not provide for a three-arbitrator panel at a single hearing, give the player a right to choose from among three appointed arbitrators, or require an equal (or any) distribution of appeals among the arbitrators. Rather, the Policy merely requires the Notice Arbitrator to "ensure that at least one arbitrator is assigned to cover every Tuesday of the playing season through the Super Bowl" to provide coverage for all arbitration appeals in a timely fashion. PES Policy, Doc. No. 39-1 at 1796. The parties to the CBA found two arbitrators under the Policy to be sufficient for these purposes.

Indeed, as noted above, the NFLMC and NFLPA did not agree upon the appointment of a third arbitrator until recently, but Johnson does not argue that this prevented him from having his

appeal timely heard and decided by one of the two neutrals available at the time. Whether there were two or three arbitrators assigned to hear appeals under the PES Policy could have no impact on Johnson's rights as the Policy did not give Johnson the right to select any particular arbitrator from among the roster of neutrals or require any particular rotation. Further, the number of PES Policy arbitrators was no different for Johnson than for any other player at the time—so his claim of discrimination, corruption or retaliation makes no sense.

Second, Johnson does not contend that the arbitrator selection process "materially relate[s] to an issue involved in the arbitration." Mot., Doc. No. 52-1 at 2278. Having admitted under oath at the hearing to the ingestion of a substance banned under the PES Policy, Johnson has not presented, and cannot present, evidence that is "clear and convincing" (*id.*) that Arbitrator Wong or any other neutral arbitrator selected by the NFLPA and NFLMC would have decided Johnson's appeal differently—indeed, the opposite is true.

Third, Johnson cannot prove that "due diligence would not have prompted [discovery of the alleged arbitrator-selection misconduct] during or prior to the arbitration" (*id.*) for the simple reason that Johnson *did* discover—he was told by the NFLPA—that there were only two arbitrators under the PES Policy prior to the arbitration hearing. *See* Ex. E at 1. The *Tamarkin* and *Allen* cases cited by Johnson do not change the equation. Mot., Doc. No. 52-1 at 2279-80. *Tamarkin* is inapposite because, there, the arbitrator "was not properly selected under . . . the CBA" and the plaintiff had "repeatedly objected" to such improper appointment. *The Tamarkin Co. v. Chauffeurs, Teamsters, Warehousemen & Helpers Local Union No. 377*, No. 4:09-cv 2927, 2010 WL 1434320, at *4, 9 (N.D. Ohio Apr. 8, 2010) (Lioi, J.). This is a far cry from what happened in this case where Arbitrators Carter and Wong were selected by the NFLMC and NFLPA pursuant to the terms of the PES Policy (regardless of whether there were two or three

arbitrators), Johnson knowingly elected to have Carter preside over his arbitration appeal, and Johnson did not object to his appointment during the arbitration. In *Allen*, there was "proof" that the union and employer "acted jointly" to select the arbitrator "because of [the employer's] information that [the arbitrator] would likely dismiss the grievance and decide in favor of [the employer]." *Allen v. Allied Plan Maint. Co.*, 881 F.2d 291, 294, 298 (6th Cir. 1989). Here, Johnson—the grievant himself—chose to proceed before Carter rather than Wong.

Finally, with respect to the NFLPA's statement in *Pennel* that there were two arbitrators instead of three "because there are simply not enough appeal hearings under the Policy to justify having three arbitrators in rotation," that was and remains true. However, because Pennel—represented by Johnson's counsel—sued over that very issue, the NFL and NFLPA appointed a third arbitrator going forward in the interest of avoiding disputes over the matter. *See Pennel v. NFLPA et al.*, No. 5:16-cv-02889-JRA (N.D. Ohio), Doc. No. 17 (Dec. 2, 2016) at 183-84, attached hereto as Exhibit G; *see also id.*, Doc. No. 8 (Nov. 30, 2016) at 112, attached hereto as Exhibit H. This is why the NFL and NFLPA did not agree on a third arbitrator until recently.

B. Johnson's Remaining Claims of Corruption Also Fail

What remains of Johnson's corruption, fraud, and undue means argument is another transparent effort to have the Court reconsider the merits of Arbitrator Carter's discovery rulings under the guise of a Section 10(a)(1) motion. But none of the arguments come close to *proving* corruption by *clear and convincing evidence*; all that Johnson advances to support this claim are conclusory allegations that are wholly insufficient to support a motion to vacate. *First*, Johnson offers yet another fanciful and unsupported conspiracy theory with respect to the (former) Chief Toxicologist who did not certify Johnson's 2016 test results for the simple reason that he had retired. Arbitrator Carter did not require the parties to produce their agreement that the Directors

of the UCLA Olympic Analytical Laboratory and the Sports Medicine Research and Testing Laboratory would fulfill the Chief Toxicologist's duties because counsel for the parties proffered as much on the record. *See* Disc. Hr'g Tr. 59:3-62:8, Doc. No. 52-6 at 2618-19; Refiled Mot. to Vacate Arb. Award, Ex. 8, Disc. Objections, Doc. No. 52-9 at 2642; Refiled Mot. to Vacate Arb. Award, Ex. 9, Disc. Ruling, Doc. No. 52-10 at 2646. To put to rest Johnson's extraordinary claim that the parties reached no such agreement, or that its terms had any relevance to the underlying arbitration, the NFLPA attaches it here as Exhibit I.

Second, Johnson complains that "The NFL Denied Johnson His Testing History and Records" and Dr. Lombardo "did not copy the NFLPA on his email response to Johnson" because "[t]he NFL prohibited Lombardo from reporting to the NFLPA." Mot., Doc. No. 52-1 at 2281 & n.13. Because this claim is directed at the NFL, the NFLPA will leave it to the NFL to respond.

Third, Johnson argues that corruption is further evidenced by "The NFL Den[ying] Johnson [Laboratory] Protocols and Procedures." *Id.* at 2282. Although this is another claim not directed at the NFLPA, it bears mention that Arbitrator Carter "ordered the NFL to produce: . . . any other testing laboratory 'protocols' referenced in the Policy or used by the UCLA lab . . . to Mr. Johnson's counsel and the NFLPA." *Id.* (quoting FAC ¶ 162, Doc. No. 39 at 1755). Johnson offers no explanation for why an allegedly evidently partial, corrupt, and fraudulent arbitrator who was supposedly conspiring against him would have issued this (and other) discovery rulings in Johnson's favor. In all events, Johnson has not produced a shred of evidence in this proceeding to back up any of his wild corruption allegations against the NFLPA.

CONCLUSION

For all of the reasons set forth above, Johnson's Motion should be denied.

Dated: April 14, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to Local Rule 7.1(f), the undersigned certifies that as of the date of filing, April 14, 2017, this case has not yet been assigned to a track and further certifies that the foregoing memorandum adheres to the page limitations set forth in Local Rule 7.1(f) and Section VIII of the Court's Initial Standing Order.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

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